Supreme Court, U.S.
FILED
AUG 16 1985
JOSE... L. JR.

No. 85-97

In The
Supreme Court of the United States
October Term, 1984

PETROLEUM HELICOPTERS, INC.,
Petitioner,

v.

CAROL T. SINCOX, individually and as natural tutrix of the minors, Byron Sincox, etc.,
Respondent.

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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August 16, 1985

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TABLE OF CONTENTS

Page

REASON FOR DENYING THE WRIT 1

THE ORDER OF THE DISTRICT COURT STRIKING PLAINTIFF'S CLAIM UNDER THE LOUISIANA WRONGFUL DEATH STATUTE WAS NOT PROPERLY "IN" THE COURT OF APPEALS WHEN THE PETITION FOR CERTIORARI WAS FILED IN THIS COURT. 1

CONCLUSION 3

APPENDIX:

Order of the district court ..... App. 1

TABLE OF AUTHORITIES

CASES: Page

Alexander v. United Technologies Corp., 548 F. Supp. 139 (D. Conn. 1982) 3

Escondido Mutual Water v. La Jolla Indians, — U.S. —, —, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984) 3

In Re Complaint of Exxon Corp., 548 F.Supp. 977 (S.D.N.Y. 1982) 3

Lowe v. Trans World Airlines, Inc., 396 F.Supp. 9 (S.D.N.Y. 1975) 3

Rairigh v. Erlbeck, 488 F.Supp. 865 (D. Md. 1980) 3

Safir v. Compagnie Generale Transatlantique, 241 F.Supp. 501 (E.D.N.Y. 1965) 3

Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985) 1, 2, 3

The E. B. Ward, Jr., 17 Fed. 456 (5th Cir. 1883) 2

United States v. Nixon, 418 U.S. 688 (1974) 1

STATUTES:

28 U.S.C. 1291 1

28 U.S.C. 1292(a)(3) 1, 2

28 U.S.C. 1292(b) 1

46 U.S.C. 761-767 2

La C.C. 2315 2

REASONS FOR DENYING THE WRIT

THE ORDER OF THE DISTRICT COURT STRIKING PLAINTIFF'S CLAIM UNDER THE LOUISIANA WRONGFUL DEATH STATUTE WAS NOT PROPERLY "IN" THE COURT OF APPEALS WHEN THE PETITION FOR CERTERIORARI WAS FILED IN THIS COURT.

In the district court, plaintiff sought certification of the court's interlocutory judgment for appeal under 28 U.S.C. 1292(b). (Appendix.) This request was denied by the district court, and plaintiff then sought appeal of the order under 28 U.S.C. 1292(a) (3). Defendant-petitioners in the appeal to the Fifth Circuit strongly urged that plaintiff-respondent's original appeal to the Fifth Circuit was outside the jurisdiction of the Court of Appeal. These arguments, however, were never addressed by the Fifth Circuit because prior to hearing the case on the merits, the Fifth Circuit remanded the case to the district court for reconsideration in light of its recent decision in *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985).

The initial question which this Court must then decide is whether or not the original order issued by the district court was an appealable order and whether this case was properly "in" the Court of Appeals when the petition for certiorari was filed. See *United States v. Nixon*, 418 U.S. 688 (1974).

The order rendered by the district court was not a final judgment as contemplated by 28 U.S.C. 1291. Therefore, in order for this case to properly be "in" the Court of Appeals at the time of filing of the petition of certiorari, the appeal must fall within the categories specified in 28

U.S.C. 1292. The only possible category would be 28 U.S.C. 1292(a)(3) dealing with interlocutory decrees in admiralty cases. On appeal to the Fifth Circuit, defendant-petitioner argued in brief that plaintiff-respondent's appeal did not fall within 28 U.S.C. 1292(a)(3) because the order dealt with non-admiralty remedies. Plaintiff-respondent would now join with defendant-petitioner in agreeing that there is doubt that this Court has jurisdiction of an appeal of an interlocutory order denying a non-admiralty claim. The petition for certiorari should therefore be dismissed since the case was not "in" the Court of Appeals at the time the petition was applied for.

THE DECISION IN TALLENTIRE v. OFFSHORE LOGISTICS, INC., 754 F.2d 1274 (5th Cir. 1985) PROPERLY INTERPRETS SECTION 7 OF THE DEATH ON THE HIGH SEAS ACT.

The Death on the High Seas Act, 46 U.S.C. 761 et seq provides at Section 767:

> "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone."

Prior to passage of the Death on the High Seas Act, Louisiana's wrongful death statute, La. C.C. 2315, had been applied outside the territorial limits of the State of Louisiana in *The E. B. Ward, Jr.*, 17 Fed. 456 (5th Cir. 1883). Additionally, other courts have recently held that the Death on the High Seas Act was not exclusive and that state wrongful death remedies were applicable and pre-

served by Section 7. See *In Re Complaint of Exxon Corp.*, 548 F.Supp. 977 (S.D.N.Y. 1982); *Alexander v. United Technologies Corp.*, 548 F.Supp. 139 (D. Conn. 1982); *Rairigh v. Erlbeck*, 488 F.Supp. 865 (D. Md. 1980); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9 (S.D.N.Y. 1975); *Safir v. Compagnie Generale Transatlantique*, 241 F.Supp. 501 (E.D.N.Y. 1965).

In *Tallentire, supra,* the Fifth Circuit simply gave a reasonable interpretation to the black and white letter of the law contained in Section 7. The language of Section 7 of the Death on the High Seas Act is clear. If the statute was intended to allow state remedies only within the territorial limits of the states, then there was no need for the first sentence of Section 7. Plain words of the statute are ordinarily regarded as controlling, and the plain words of this statute would allow the wrongful death remedy of the Death on the High Seas Act to be supplemented by Louisiana's wrongful death act. See *Escondido Mutual Water v. La Jolla Indians,* — U.S. —, —, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984).

—o—

CONCLUSION

Certiorari should not be granted in this case because the case was not properly on appeal at the time the petition for certiorari was filed, and the decision upon which the remand was based, *Tallentire v. Offshore Logistics, Inc., supra,* is a correct interpretation of Section 7 of the

Death on the High Seas Act which does not require review by this Court.

Respectfully submitted,

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*Counsel of Record

August 16, 1985

APPENDIX

WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION
in Opelousas

SEPTEMBER 18, 1984

PRESENT: HON. JOHN M. SHAW, JUDGE, Presiding
....., Court Reporter
Mildred Baker, Minute Clerk

COURT OPENED: 9:30 AM COURT ADJOURNED: 11:00 AM

MINUTES OF COURT

CASE NO: 84-1051

SECTION O

CAROL T. SINCOX, ET AL VS. PETROLEUM HELICOPTERS, INC.

APPEARANCES

DANNY LIRETTE	FOR PLAINTIFFS
.....	FOR.....
VANCE E. ELLEFSON	FOR PETROLEUM HELICOPTERS, INC.
.....	FOR.....
.....	FOR.....
.....	FOR.....
.....	FOR.....
.....	FOR.....

CASE CALLED FOR

x Hearing on motions	FILINGS: .....
— Jury selection only	.....
— Trial with/without jury, ... day	.....
— Other	.....

PROCEEDINGS:	JURORS SELECTED & SWORN TO TRY CASE:
—Witnesses sequestered	(1).....
—Opening statement—plaintiff	(2).....
—Opening statement—defendant	(3).....
—Testimony & evidence for pltf., not concluded	(4).....
—Testimony & evidence for deft., not concluded	(5).....
	(6).....

—Rebuttal testimony & evidence, not concluded (7)..... (8).....
—Evidence closed (9).....
—Evidence left open for ..... (10).....
—Case argued (11).....
—Jury instructed (12).....
—Alternate Juror(s) excused (Alt).....
—Jury deliberations began at .... AM/PM (Alt).....
—Jury verdict returned at .... AM/PM (Alt).....
—Jury polled
—Case ruled on by the Court —See Below
—Case taken under advisement
—Briefing times—See Below
—Mistrial declared

VERDICT, RULING, COMMENTS:

Motion on behalf of Petroleum Helicopters for judgment on the pleadings argued, submitted and GRANTED as to Art. 2315 and Outer Continental Shelf Lands Act claims. Plaintiffs' remaining claims lie under DOHSA and the General Maritime Law. Counsel for plaintiffs conceded that there is no diversity and trial will be before the Judge, not a jury.

Plaintiff's request that the interlocutory judgment be certified for appeal under 28 U.S.C.A. 1292(b) is denied.